**Brown and Lambrecht Earth Movers, Inc. *and* Operating Engineers Local Union No. 3 of the International Union of Operating Engineers, AFL-CIO.** Case 27-CA-7774

16 August 1983

## DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JENKINS AND ZIMMERMAN

On 21 January 1983 Administrative Law Judge Timothy D. Nelson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief, as well as an answering brief in opposition to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

The Administrative Law Judge stated in sec. 1,A, of his Decision that laborers were excluded from the petitioned-for unit and the election occurred on December 12, whereas the record shows that laborers were included in the unit and the election occurred on December 11. Further, the Administrative Law Judge stated inadvertently at fn. 22 that certiorari review had been denied in *NLRB v. Transportation Management Corp.*, 674 F.2d 130 (1st Cir. 1982), whereas certiorari review was granted, 103 S. Ct. 372 (1982).

[2] We adopt the Administrative Law Judge's dismissal of an alleged violation of Sec. 8(a)(1) of the Act growing out of a conversation between Terry Carlen and Supervisor Bruce Hutton. In so doing, we rely on the credited testimony of Carlen that the conversation was one of many between the men, most of which were initiated by Carlen and often included solicitations of the other's union sentiments. (Hutton himself was a member of another local of the same international union.) That Hutton, on this occasion, was the initiator of the conversation does not raise his inquiry as to why Carlen thought so much of the Union into a violation of the Act under *PPG Industries, Lexington Plant, Fiber Glass Division*, 251 NLRB 1146 (1980). This casual conversation was part of a larger dialogue between the men and does not manifest the kind of discouragement of union activities which *PPG Industries, supra*, seeks to prevent.

Chairman Dotson would also dismiss the alleged violation. Following Member Hunter's dissenting opinion in *Donnelly Co., Division of Brockhouse Corp.*, 265 NLRB No. 196 (1982), he would overrule *PPG Industries* and its rule with regard to questioning known union adherents as to their union sentiments.

[3] We agree with the Administrative Law Judge that reinstatement is an inappropriate remedy as work on the Intermountain Power Project was of limited duration; however, we shall modify his recommended remedy, Order, and notice to require Respondent to send a letter to Gerald Briggs and Terry Carlen stating that they will be considered eligible for employment in the future at any of Respondent's projects if they should choose to apply for employment at any of them. Respondent is not required to offer Carlen and Briggs employment at other projects but only to consider them for employment on a nondiscriminatory basis. *Al Monzo Construction Co.*, 198 NLRB 1212, 1219 (1972).

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Brown and Lambrecht Earth Movers, Inc., Delta, Utah, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified.

1. In paragraph 1 change "in any other like or related manner" to "in any like or related manner."

2. Substitute the following for paragraph 2(a):

"(a) Make employees Gerald Briggs and Terry Carlen whole, with interest, for, respectively, having prematurely laid Briggs off on December 3, 1981, and for having refused to recall both Briggs and Carlen when work on the IPP was resumed in 1982, and assure them in writing of their future eligibility for employment by Respondent in the manner and to the extent set forth in this Decision."

3. Substitute the attached notice for that of the Administrative Law Judge.

## APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all parties had the chance to introduce evidence and arguments, the National Labor Relations Board has found that we violated employee rights in connection with our IPP job at Delta, Utah, by laying off Gerald Briggs before he would otherwise have been laid off for the winter, and by refusing to recall Gerald Briggs or Terry Carlen when work resumed on that project in the spring, all because Gerald Briggs and Terry Carlen supported Operating Engineers Local Union No. 3 of the International Union of Operating Engineers, AFL-CIO, in its organizing campaign at the IPP job in the autumn of 1981. The Board has ordered us to stop violating employees' rights under Federal law and to live up to the promises in this notice.

> The National Labor Relations Act gives employees the right to form, join, or assist unions, to bargain collectively with their employers through representatives freely chosen by a ma-

jority of them, to engage in other group activities for their mutual aid and protection, on the job, and to refrain from such activities unless that right has been limited by a lawful union-security agreement with an employer requiring employees to join a union after they have been employed for a certain grace period.

WE WILL NOT lay off or fail to recall employees from layoff in order to discourage membership in Operating Engineers Local 3, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by the Act.

WE WILL make whole Gerald Briggs and Terry Carlen, with interest, for the unlawful discrimination we practiced against them, and WE WILL assure them in writing that they are eligible for future employment by us.

BROWN AND LAMBRECHT EARTH MOVERS, INC.

## DECISION

### STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge: Timely unfair labor practice charges were filed by Operating Engineers Local 3 (Union) against Brown and Lambrecht Earth Movers, Inc. (Respondent), on March 22, 1982.[1] Following an administrative investigation into them, the Regional Director for Region 27 of the National Labor Relations Board (Board) issued a complaint and notice of hearing against Respondent on May 27. The complaint alleges, in substance, that Respondent, for discriminatory reasons relating to their organizing activities for the Union, prematurely laid off equipment operator Gerald Briggs in early December and refused to recall him when construction resumed in the spring and that Respondent similarly refused to recall equipment operator Terry Carlen when work resumed in the spring.[2]

The complaint also alleges that Respondent's agents made unlawfully coercive statements to employees bearing on their union activities.

Respondent duly answered, admitting the supervisory/agency status of certain named individuals and that its operations were properly subject to the Board's jurisdiction, but denying any substantive wrongdoing.

I heard the matter in trial at Salt Lake City, Utah, on November 9 and 10, 1982. I have given close consideration to the post-trial briefs filed by the parties and, upon the entire record[3] I make these:

### FINDINGS OF FACT AND PRELIMINARY CONCLUSIONS

#### A. *Background and Overview*

Respondent, an Illinois corporation engaged generally in earth moving and related heavy construction work, was the contractor engaged in site preparation and roadbed clearing on the preliminary stages of the construction of a large power plant at Delta, Utah,[4] known as the Intermountain Power Project (IPP). The major portion of Respondent's work on the IPP took place between September and June.

Tom Lambrecht, one of Respondent's executive officers, was in regular telephonic contact with the jobsite from his offices in Illinois, and also made occasional visits to the site. Day-to-day control of the Delta operation was exercised by Respondent's Project Manager Elmer William (Bill) Block, who was also responsible for decisions about the hiring, layoff, and firing of employees. James Florey was a project administrator, involved in administrative duties which were performed in the construction office maintained by Respondent near the jobsite. Crew foremen directly supervised various onsite operations.[5]

At full complement in the period between September and late November, Respondent employed as many as 130 persons working in heavy equipment operation and laboring capacities. Those employees were not represented by a union. On September 28, however, the Union filed a representation petition in Case 27-RC-6274 seeking an election in a unit of equipment operators and related miscellaneous classifications (but excluding, among others, laborers). An election was held on December 11, which the Union lost by a vote of 49 to 30, with 13 nondeterminative challenged ballots. Despite the Union's objections, the Board certified the results on June 21, 1982.

Alleged discriminatees Terry Carlen and Gerald Briggs were prounion activists in the preelection organizing drive and campaign, both of them securing several authorization cards from their fellow operators and otherwise talking up the Union and also serving as the Union's official observers at the December 12 election. Respondent's agents, including Project Manager Block, readily concede that they knew of Briggs' and Carlen prounion activities, along with those of other operators; and there were, admittedly, many conversations between Respondent's agents and known prounion employees (including Briggs and Carlen) on the subject of the union

[1] This case concerns events occurring over the period autumn 1981 to early spring 1982. The calendar year of events described below will therefore be apparent solely from the month references.

[2] Unlike Briggs' early December layoff, Carlen's layoff in late December is not alleged to have been unlawful.

[3] The record was held open until the due date for receipt of briefs for the purpose of permitting the parties to furnish a stipulation regarding the precise dates when a certain Charlie Spires occupied status as the statutory supervisor and agent of Respondent. Such a stipulation was timely furnished by the parties and I received it into evidence and closed the record by written order dated December 10, 1982.

[4] Respondent annually purchases and receives goods and materials valued in excess of $50,000 directly from points and places outside Utah.

[5] Any person identified hereafter as a foreman has been admitted by Respondent to be a "supervisor" within the meaning of Sec. 2(11) of the Act.

drive. Respondent's agents campaigned actively, all under the general advice and supervision of Rich Curren, a private labor relations consultant.

Carlen and Briggs were among the first group of operators hired directly by Block at the start of IPP site preparation work in September. Carlen had worked for Respondent on other construction projects in the Midwest and his work background was personally known to Block. As is discussed in greater detail below, Block maintains that both Briggs and Carlen revealed undesirable performance traits on the IPP, linked to a poor "attitude"; but Block concedes that each was an able and experienced operator of the types of heavy equipment used by Respondent on that job.

Briggs was working as a night-shift loader operator until early November, when he was reassigned to the day shift. Block testified without contradiction that the night-shift operator complement was cut back from 40 to 12 at this time. Almost all of those operators were apparently retained, however, just as Briggs was.[6]

Briggs was selected by Block for layoff on December 3, a point roughly 2-1/2 weeks before the December 20 date on which the largest group of remaining operators was laid off in connection with a general winter shutdown.[7]

Carlen was laid off on December 19. Neither Carlen nor Briggs was told at the time of layoff that he would not be recalled. Indeed, Block testified that he had not formed any specific intention not to recall Briggs or Carlen when they were laid off. Rather, Block testified in substance that he was unimpressed by their performance in September through December and was thereafter able to find adequate, qualified help for the renewed operations in February without ever having to resort to recalling Briggs or Carlen.

Respondent acknowledges on brief, and the record likewise shows, that most of the operators originally employed in the autumn were recalled for work in the early spring.[8] Respondent further admits, and its Exhibit 2 likewise shows, that 10 operators were hired in 1982[9] who had not previously worked for Respondent in 1981—all but 2 of those having been referred to Respondent by a local "Job Service" agency and whose skills therefore were not personally known to Block when he hired them.

### B. *Alleged 8(a)(1) Violations and Other Evidence Suggesting Respondent's Union-Related Hostility Towards Briggs and Carlen*

Briggs' and Carlen's disputed versions of certain union-related conversations with supervisory agents of Respondent are the evidentiary bases on which the General Counsel claims that Respondent's agents made statements violative of Section 8(a)(1). And, with the exception of two additional alleged statements made by Block and by Project Administrator Florey to office employee Linda Thomas, Briggs' and Carlen's disputed versions are also the bases on which the General Counsel rests in asserting that Respondent harbored animosity towards them because of their union activities and was moved by that *animus* to curtail their employment on the IPP.

Because there are essentially irreconcilable testimonial disputes between Briggs and Carlen and the supervisory agents, credibility determinations will be necessary in each instance. Each party, recognizing this, has argued at some length on brief that opposing witnesses should be discredited because they had some institutional or personal "interest" or bias. While such considerations cannot be ignored, I do not find them persuasive in reaching conclusions below. Thus, it is necessarily true that Carlen and Briggs had personal stakes in the outcome which may have tainted their testimony. Similarly, Linda Thomas, the third witness for the General Counsel, was shown eventually to have left Respondent's employ under bitter circumstances and she clearly retained a strong residue of resentment over what she viewed as unfair treatment at Respondent's hands. But, as the General Counsel effectively established, Respond-

[6] Respondent suggests otherwise—that Briggs received special treatment in surviving the reduction in the night-shift complement whereas most others did not. (Resp. br. at 3) Resp. Exh. 2, a job history summary for each employee, contradicts this, however, for it shows that, at best, only five operators were actually laid off in or around early November, thus warranting the conclusion that other operators removed from the night shift were, like Briggs, reassigned to day-shift positions. And see fn. 7, *infra.*

[7] Respondent makes a number of contentions about others laid off before the December 20 layoff. These contentions are all purportedly derived from Resp. Exh. 2, but they do not seem to be well supported from my own analysis of that exhibit. For example, Respondent asserts (at br. p. 3) that "18 other operators were layed [sic] off between the dates November 22nd and December 9th." Apart from the seeming arbitrariness of the period selected (commencing on a Sunday and ending on a Wednesday), Respondent apparently treats as a "layoff" any operator whose name appears in the "Term. Date" column for the selected period. The exhibit was not adequately qualified to be used for that purpose however; and, absent such proper qualifying foundation, I would more readily assume that at least some of the operators listed in the "Term. Date" column were either quits or discharges for cause and not merely "layoffs" (with expectancy of recall) on the dates shown. This latter conclusion is also supported by the fact that some operators are included under both the "Date of Layoff" column, as well as the "Term. Date" column (e.g., Briggs and Carlen) whereas most of the operators in the "Term Date" column are not included in the "Date of Layoff" column. At best, therefore, Resp. Exh. 2 is inconsistent in its format. It also suffers from other inconsistencies (both internal and with other uncontroverted and credible record evidence) too numerous to warrant detailing. Except as specifically noted above and below, therefore, I do not find that exhibit to be reliable.

[8] Purportedly relying on data gleaned from Resp. Exh. 2, Respondent claims here that of 93 operators employed at one point or another in 1981, 65 were recalled between February and April 1982, while 36 such operators were not. While Respondent's figure of 93 operators employed in 1981 appears to be correct (counting Beardsley, see fn. 9), it is not evident how Respondent derived the remaining figures of 65 recalls and 36 nonrecalls. There is, moreover, a facial difficulty in accepting Respondent's latter figures since they total 101—not 93, the 1981 base figure posited by Respondent. I have found Resp. Exh. 2 to be too ambiguous to justify anything more than the conclusion that *most* 1981-employed operators were recalled in 1982. And, bearing in mind, as discussed previously in fn. 7, that at least some of the 1981-employed operators must have fully severed their employment tie by voluntary quit or discharge for cause before the spring recall, I would infer that the number of nonrecalled but still *eligible* operators from 1981 was lower than the base figure of 93 used by Respondent. This would, in turn, make the percentage of such eligible operators who *were* recalled in 1982 larger than Respondent's figures would suggest.

[9] Ignoring as a plain error the hiring date of "10/02/82" shown on Resp. Exh. 2 for operator Beardsley who is otherwise shown to have worked in 1981 and to have been "terminated" in December.

ent's supervisory witnesses, long-time employees of Respondent, usually with other family members in Respondent's employ, could reasonably be suspected also of a temptation to shade their testimony (especially regarding allegedly violative statements attributed to them). But these countervailing "probability" arguments tend to cancel out one another, and I therefore do not rely on them.

What *has* influenced me in findings below was the presence or absence of real conviction or coherence in each witness' account, warranting these summary generalizations: Briggs was an often-confused, vague, and inconsistent witness in reporting conversations with supervisors which are alleged to violate Section 8(a)(1). His testimony in this area also lacked conviction and suggested a degree of improvisation. Carlen testified with greater apparent conviction and memory for detail, but, as to one key account discussed below, he engaged in a significant shift, seemingly shaping his account to adapt to a potentially damaging trial development. By contrast, with one exception, in denying the 8(a)(1) or "animus" testimony of Briggs and Carlen, the supervisors testified with more impressive conviction and an ability to recall tangential details which inspired greater confidence.

Thus, influenced by these demeanoral and related aspects, I find as follows regarding certain conversations with supervisors testified to by Briggs and Carlen:

Briggs testified about two conversations in October[10]—one with a day-shift foreman, Norm Phillips, while Phillips was driving Briggs to the jobsite as a personal accommodation; the other with his own foreman on the night shift, Jim McWilliams. As to his conversation with Phillips, Briggs' version, in summary, is that the two men were talking about aircraft and that Briggs changed the subject and asked Phillips what Briggs' chances might be to stay on as an employee of Respondent after the IPP work was completed. Phillips then assertedly replied that Briggs' chances would be "slim" if Briggs "would continue in talking about union organization."[11] Following a leading question, Briggs also recalled that Phillips said that Briggs was "doing too much talking about the union around other employees" and that if he "continued," he "would have some difficult problems with employment."

For reasons summarized earlier, I found more convincing Phillips' versions, in substance, that no such exchange took place during the ride which Phillips admittedly gave to Briggs, and that the only time anything resembling such a discussion took place was at a later time, on the jobsite during a lull in work activity. Phillips recalls that Briggs speculated aloud at the jobsite that Briggs' affiliation with an Operating Engineers Local in Peoria, Illinois, might be of some use to him in securing work on jobs which Respondent ran on a "union" basis.[12] And Phillips states that he agreed that such an affiliation might do Briggs "some good" on future "union" jobs. He also recalls saying that Briggs' Peoria Local affiliation would "not do him any good on the I.P.P. site for, at least, the present scope of B & L's work there because . . . it would be done on a nonunion basis."

The General Counsel does not argue that Phillips' admitted version violated Section 8(a)(1). A case could nevertheless be made that Phillips' admitted remark might violate Section 8(a)(1) as tending to encourage employees in the belief (contrary to law) that a union affiliation could be of some advantage in securing initial employment on a "union" job. In context, it would be difficult to conclude, however, that Phillips' admitted later remarks—that Briggs' union affiliation would "not do him any good on the I.P.P. site"—were intended to, or did, amount to a caution against engaging in organizing activities for the Union. Rather, in context, they appear to convey the message simply that, since that IPP job was nonunion, Briggs' affiliation with the Peoria Local would be of no particular advantage to him in retaining employment.

In any case, the credited testimony is a far cry from the allegation in the complaint that Phillips "*interrogated* an employee concerning his union activity and *ordered* him to discontinue his union activity" (emphasis supplied). I would, therefore, dismiss that allegation. Neither, in my opinion, does the credited testimony suggest any particular *animus* on Phillips' part towards Briggs because of his union activities. For that reason, I ignore the Phillips-Briggs exchange in assessing the alleged cases of unlawful discrimination against him.

As to the McWilliams conversation, I do not believe Briggs' testimony to the effect that McWilliams took Briggs aside and asked him if he "knew what [he] was doing to represent the Union" and then delivered some kind of tirade involving threats to see that Briggs would be terminated if he were to continue in his organizing efforts. Apart from obvious discrepancies among his various versions of the exchange, Briggs appeared at times to go well beyond mere misrecall into the zone of invention. For example, he averred at one point that McWilliams had even stated that he would never have hired Briggs if the decision had been left up to him (in Briggs' words: ". . . he would fire me from day one. He would not even have accepted me"). When I then asked Briggs if McWilliams had specifically stated why he would never have hired Briggs, Briggs had no difficulty in "recalling" additionally that McWilliams had actually stated that it was "because" Briggs was "union-affiliated." Elsewhere, however, Briggs acknowledged that his union activities on the IPP site did not begin until some weeks after he started working there; and there is no evidence that his affiliation with the Peoria Local was ever known to Respondent's agents at the time he was hired.

Independent of these considerations, McWilliams' denial of Briggs' account was credibly uttered and what

[10] Briggs was led by the General Counsel to acknowledge that the month in which these alleged conversations occurred was October. Briggs was no more precise about when they occurred or which occurred or which occurred first.

[11] This is one of the several formulations Briggs gave when questioned on the subject at various points during direct and cross-examination.

[12] It is uncontradicted that Respondent has, on some of its projects, recognized and contracted with a local affiliate of the International Union of Operating Engineers.

he admits to having said to Briggs on the subject of the Union ("I just didn't believe in paying somebody to find work for me") is legally innocuous.[13] I would, therefore, dismiss the complaint allegation that McWilliams unlawfully "interrogated" and "threatened" Briggs about his union activities. In addition, I find nothing in the credited testimony here that would suggest *animus* against Briggs or a predisposition to discriminate against him because of his protected union activities (as distinguished from work-interruptive activities).

Carlen testified about three separate, union-related discussions with supervisory foremen—one with his foreman, Bruce Hutton, and two with Charlie Spires, described by Carlen as an "old friend" who resided at the same trailer park as did Carlen and other operators. Each of these is relied on by the General Counsel as evidence of Respondent's hostility towards Carlen's union activities, although only two of them are alleged as 8(a)(1) violations.

As to his conversation with Hutton, Carlen testified as follows under examination by the General Counsel:

> Q. Did you ever speak with Bruce Hutton about this? ["the union"]
>
> A. I spoke to all the foremen, the supervision. The only one I didn't talk to was Tommy Lambrecht or Mr. Brown, but otherwise, I spoke to everyone from there on down.
>
> Q. Was there a conversation in particular with Mr. Hutton where he asked you about the union?
>
> A. Oh, yes, a number of occasions. One in particular where I was rather upset with him one noon hour. I said, "Why in the world are you against the union?"
>
> Q. Who was present when you had this conversation?
>
> A. I don't recall who was present. I don't recall who was present.
>
> Q. Was that at the jobsite?
>
> A. Yes, it was during noon hour.
>
> Q. Do you recall when it was, when this took place?
>
> A. No, but I spoke to him many times.
>
> JUDGE NELSON: Is this paragraph 5(a)?
>
> MR. CHAVEZ: Yes
>
> BY MR. CHAVEZ:
>
> Q. What was said in that conversation with Mr. Hutton?
>
> A. Well I asked him why, I said, "You have carried a union card longer than I. What are you against the union for?"
>
> And he says, "I don't think it is a good local."
>
> I said, "Well that's beside the point. There is other locals. There will be other trades coming on this project to do the work. It won't just be local 3."
>
> He said, "That part don't worry me any. I don't expect to be here that long anyway."
>
> Q. How did this conversation begin?
>
> A. Well, I was for the union and he was against it. What do you mean how it began? In what sense? What day it began?
>
> Q. No, who initiated the conversation? Was Mr. Hutton doing anything at the time?
>
> A. Yeah, I think he brought it up at the time. Most of the time I brought it up, but I think at this time he brought it up.
>
> Q. What did he ask you or tell you?
>
> A. He asked me why I though so much of the union, and I explained to him why, because of the benefits, later outcome after it is organized, workmanship so far as health and welfare, working conditions.

Hutton testified for Respondent and did not directly deny that the exchange occurred as Carlen reported it; although Hutton testified generally regarding his several union-related conversations with Carlen that it had always been Carlen who had "initiated" them. I credit Carlen's essentially undenied account, including his specific recollection as to who "initiated" this particular conversation, viewing Hutton's general suggestion to the contrary as reflective of no clear recollection on his part.

As noted by the General Counsel on the record, this incident is the subject of a complaint allegation that Respondent, through Hutton, violated Section 8(a)(1) by "interrogating" Carlen "concerning his union activities and sympathies." The General Counsel ignores the matter in his brief; and, were it not for the Board's holding in *PPG*,[14] I would be inclined to treat the General Counsel's silence on the question of the legality of Hutton's conduct as an abandonment of the allegation. This would be consistent with my own view that any "interrogation" in the episode decribed by Carlen is hard to spot and, once identified (i.e., "He asked me why I thought so much of the union . . ."), it is yet more difficult to identify any coercive quality to the question. This is especially so when one considers the essentially informal, man-to-man setting described by Carlen, in which Carlen is admittedly talking with a low-level foreman who, consistent with construction industry practice, himself holds membership in a sister local of the International Union.

*PPG, supra*, nevertheless requires me to take the matter seriously as a potential 8(a)(1) violation, even if the General Counsel has chosen not to address the point. For *PPG* reflects a disposition by the Board to treat as unlawful "probing" any such questioning, even when directed at a visible and outspoken union advocate. Thus, the Board summarily stated in *PPG, supra* at 1147:

[13] McWilliams stated that in an entirely unrelated event, when production had stopped and he had received a report that Briggs and others were signing union cards and/or reading union literature while supposed to be working, he went to the area and told the assembled workers, Briggs included, that "If they didn't get to work and if [he] caught them doing it again, [He would] fire them." This was not alleged in the complaint nor litigated at trial, nor argued on brief as an independent violation and I would not so find on this record, crediting McWilliams' account of the circumstances.

[14] *PPG Industries*, 251 NLRB 1146 (1980).

> The type of questioning at issue[15] conveys an employer's displeasure with employees' union activities and thereby discourages such activities in the future. The coercive impact of these questions is not diminished by the employees' open union support or by the absence of attendant threats.

The question persists, however, whether *PPG* was intended to rule out from consideration the surrounding context in determining whether a supervisor's question to an employee to the effect: "Why do you want the Union?" is unlawfully coercive.

Due respect must be given to the presumption of coerciveness which the Board evidently attaches to such questioning. But the difficulties are manifold in treating the quoted language in *PPG*, as creating anything more than a presumption of illegality when such a question is asked. First, there are inherent difficulties, not requiring elaboration here, with any *per se* rules in this area. More specifically, to treat the Board's statement in *PPG* as creating a *per se* rule will, upon analysis and logical extension, yield legally incongruous results. Thus, the stated rationale in *PPG* is that such "questioning conveys an employer's *displeasure* with employees' union activities . . ." (emphasis supplied) which displeasure "thereby discourages such activities in the future." But the Board must have intended that some limits be placed on the notion voiced in *PPG* that an expression of employer "displeasures" towards organizing activities will violate the Act. For, it is established in the so-called free speech provisions of Section 8(c) of the Act that an employer may express "views, argument, or opinion" so long as "such expression contains no threat of reprisal or force or promise of benefit." And it would be incongruous for it to be established that an employer may directly express his "view" or "opinion" about having a union (e.g., "I don't want a union")—itself necessarily expressing his "displeasure" with the notion—and yet to hold, as *PPG* arguably does, that an *indirect* expression of employer displeasure through the use of the question "Why do you want a union?" violates Federal labor law. Accordingly, something more than the mere communication of employer displeasure must be lurking in such a supervisory question for it to violate Section 8(a)(1). That is, there must be some implicit suggestion that the employer's displeasure will manifest itself in some act of reprisal or force or conferral of a benefit. And to recognize that these conditions must obtain before the expression of an employer's "displeasure" will violate the Act is to acknowledge that context and other surrounding circumstances must be examined to reach a result consistent with the governing statute.

I am thus persuaded that I may not ignore context in my analysis of the Hutton-Carlen episode. And, considering the contextual features detailed earlier, I find it difficult to conclude that Hutton's question to Carlen reasonably tended to communicate to Carlen that Respondent's displeasure with Carlen's union activities[16] would manifest itself in acts of reprisal or other coercive measures. I would therefore dismiss the complaint allegation linked to this noontime exchange between Hutton and Carlen. Neither would I find it to add much to the pool of employer *animus* against Carlen which this record might otherwise disclose.

Carlen's accounts of the two conversations which he had with his "old friend," Foreman Charlie Spires, would, if believed, provide substantial evidence of Respondent's hostility towards Carlen and a predisposition to discriminate against him because of his union activities. In substance, Carlen avers that Spires confided to him first (in the preelection period) that his union activities would adversely affect Carlen's employment prospects, in part because "Tommy Lambrecht don't like it"; and, later (in the spring when Carlen was awaiting recall) that Project Manager Block told Spires that Carlen would not be recalled by Respondent and that Carlen should "have the union get him a job."[17] For reasons detailed above, I found Spires' denials of Carlen accounts of the two conversations to be more convincing. In addition, I am influenced by suspicions about Carlen's candor due to a shift in his testimony which developed after it appeared from Spires' testimony that Spires might not have been cloaked with supervisory authority at the time that Carlen originally stated that Spires related to Carlen the arguable "admission" that Block had said that Carlen should "have the union get him a job." In substance, Carlen initially placed the timing of this arguable admission at the point in the "middle or the latter part of February" when Respondent had just called "10 or 15 men back to work." Later, however, it developed from Spires' accurate testimony that he was first recalled about his point (mid-late February) as a nonsupervisory operator, and was not reassigned to a supervisory foreman's post until over a week later. Carlen was then recalled to the witness stand at the rebuttal stage and was then able to recall somehow that the "admission" by Spires occurred "three to four weeks *after* he [Spires] went to work." Carlen was present in the hearing room during a colloquy between and among counsel and the bench wherein the legal significance of the timing of the alleged "admission" was discussed in some detail.[18] And I regard the shift in his testimony as to the timing as suggestive of a tendency to invent, causing me to doubt, in-

[15] The "questioning at issue" occurred in a variety of factual settings in *PPG* but included two instances in which different supervisory foremen had, respectively (using the Board's characterization of the evidence), "asked [a known supporter of the union] what she thought the Union would do for employees," and "solicited her thoughts about what the Union could accomplish." 251 NLRB at 1147. It is plain from the quoted main text that the Board was treating these instances as legally indistinguishable from the others also cited.

[16] It deserves emphasizing that it is not open to dispute at this level whether the question "Why do you want the Union?" will communicate an employer's displeasure with union activity. That issue is settled unmistakably in *PPG*. I am thus bound to presume herein that Hutton's question to Carlen conveyed a message that Respondent was displeased with his union activities. For the reasons outlined in the main text, however, this does not end the inquiry which I am charged with making.

[17] The first of Spires' quoted statements is alleged to violate Sec. 8(a)(1); the second one, unaccountably, is not.

[18] If Spires had been a supervisory agent when making the statement in question, it was properly receivable, notwithstanding its hearsay quality, as an admission of a party. If he was not a supervisor at the time, then his statement was mere inadmissible hearsay, since Spires possessed no capacity as an agent of Respondent to make an admission on its behalf. See Fed. R. Evid. Rule 801(d)(2)(D).

dependent of Spires' denial, that the alleged statement was ever made. Because I cannot treat Carlen's testimony regarding Spires' alleged statements as reliable, I do not attempt to establish the precise timing of something which I am inclined to believe did not happen.

The only other direct evidence of Respondent's hostility towards Briggs and Carlen because of their union activities is in the testimony of former office employee Linda Thomas, who performed a variety of services for Respondent's managers on the IPP and who identified herself with management's cause during the union campaign. Thomas credibly testified, without contradiction by Block, that she had reported to Block in early November that Briggs was maintaining a notebook log about mechanical problems with Respondent's equipment for potential submission to a public agency dealing with job safety ("OSHA" was the term used by Thomas). Thomas reported that Block became angry when she told him this, referring to Briggs as a "son-of-a-bitch" and recalling that Block had not only given Briggs his job but had also given him a direct $50 loan from his own pocket to tide Briggs over until his first paycheck. I credit Thomas' sincerely uttered and undenied account regarding this incident.

Thomas also testified about a conversation with Project Administrator James Florey on the morning after the representation election, after he had concluded an election-related telephone conversation with Tom Lambrecht. According to Thomas, after she had answered the phone and Lambrecht had asked her to put Florey on the line, she overheard Florey make some reference to Carlen appearing to be "sobered" after the election results had been made known. Then, after Florey go off the telephone, Thomas states that she asked Florey what would happen to Carlen, and that Florey replied to the effect that Lambrecht had said that if the election had been "lost," Carlen "was not to come back."

Florey essentially denies the foregoing, couching his denial in the form of a lack of recollection. Moreover, Florey's denials were all linked to his recollection about a call which he had received from Lambrecht on the evening of the day of the election itself, rather than on the next morning, as related by Thomas. The General Counsel argues, because of this latter feature, that Florey never denied Thomas' testimony about a call on the morning of the day after the election. While it is conceivable that Florey's testimony on this subject was simply an elaborate device to give the appearance of denying Thomas' account while preserving a certain insulation from a potential charge of perjury, I do not so construe it. I nevertheless found Florey's denials, such as they were, to be somewhat hesitant and unconvincing. Balancing this against Thomas' apparently sincere and detailed account, I credit Thomas.

It should be added, however, in any findings bearing on the question of Respondent's *animus* towards the alleged discriminatees, that Thomas also acknowledged on cross-examination that Respondent's Labor Relations Agent Curren made statements immediately after the election suggesting that Respondent bore Carlen no abiding ill will because of his prounion activities. Thus, Thomas recalled, and I find, that Curren said to her: "Linda, I want you to let Chief [Carlen's nickname] know that I respect him for everything that happened out there, and I want you to let him know that he doesn't have to worry about losing his job."

### Analysis, Further Findings, and Conclusions

Considered alone, the foregoing findings, although often unfavorable to the General Counsel's case, nevertheless present a slender *prima facie* basis for concluding that Respondent had discriminatory motives for the complained-of treatment accorded to Briggs and Carlen. Thus, in each case, the credited evidence shows that Respondent knew of their union activities, that it resented them to some degree,[19] and that Respondent took adverse action against them at a later point not so distant from their original union activities as to be dismissed as "remote."

Respondent's defensive presentation consisted primarily of the testimony of Block, the decisionmaker, with some degree of corroborative testimony from other foremen. If given any degree of credence whatsoever, Block's testimony would be adequate to show that other, nondiscriminatory, motives also figured in Block's decision first to lay off Briggs earlier than many of the other operators, and later to decide against recalling either Briggs or Carlen. This suggests that a "causation" analysis may be necessary, prescribed in *Wright Line*[20] as follows:

> First we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place in the absence of the protected conduct. [251 NLRB at 1089.]

[19] Respondent's general resistance to being organized on the IPP job alone ought to be sufficient to justify an inference that Respondent would represent prounion activists. This type of inferable *animus* is of different character, however, from that which is manifested in specific statements of employer hostility directed at a particular union activist because of his union activities. For evidence of the latter type of *animus*, one would have to point solely to Florey's admission to Thomas that Tom Lambrecht was prepare not to retain Carlen if the election vote had gone the the other way. And, in Briggs' case, the only such potential evidence in this credited record would be Block's resentful statements upon learning from Thomas that Briggs was keeping a kind of "OSHA log." OSHA-filing activities by a single employee are protected by the Act under current Board interpretations (see, e.g., *Alleluia Cushion Co.*, 221 NLRB 999, 1000 (1975); *Bighorn Beverage*, 236 NLRB 736 752–753 (1978), enfd. as modified in pertinent part 614 F.2d 1238 (9th Cir. 1980)). But it must further be recognized that the *animus* towards Briggs' OSHA-related records-keeping is not necessarily the same as resentment of Briggs' union activities. Here, however, I would not find it difficult to impute the same resentment shown by Block towards the former type of protested activity to Briggs' union activities, especially since Briggs was, during the same period, publicly distinguished in Respondent's eyes as a prounion activist, and it is likely that Block viewed the OSHA and union activities as related, if not distinguishable, phenomena. See, e.g., *Green Country Casting Corp.*, 262 NLRB 66 (1982); *Crown Cork & Seal Co.*, 255 NLRB 14, 38 (1981), enfd. 691 F.2d 506 (9th Cir. 1982).

[20] *Wright Line*, 251 NLRB 1083 (1980), enfd. (expressing reservations) 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). But see *NLRB v. Transportation Management Corp.*, 674 F.2d 130 (1st Cir. 1982), cert. denied 103 S.Ct. 372 (1982).

I have found that the credited record presents a *prima facie* case of discrimination in violation of Section 8(a)(3) and (1). Under *Wright Line*, the burden has thus shifted to Respondent to "demonstrate" that it would not have taken the action it did against Briggs and Carlen had it not been for their protected activity. It is my ultimate conclusion that Respondent has not met this burden[21] and that, indeed, in the course of presenting its defense, it has created additional suspicion about its actions. Its defensive presentation has, indeed, tended to the whole, to reinforce, rather than to undermine, the *prima facie* indications that unlawful considerations actually "caused" the adverse action against Briggs and Carlen. *Shattuck Denn Mining Corp.*, 157 NLRB 1328, 1336 (1965), enfd. 362 F.2d 466, 470 (9th Cir. 1966). More particularly, for the reasons set forth below, I do not find in Briggs' or Carlen's case that the reasons expressed by Block truly figured in his decisions to affect their tenure adversely. Rather, I find that Block was solely influenced by unlawful considerations in those cases—thus obviating a *Wright Line* analysis which presupposes the existence of "dual motives" (251 NLRB at 1083-84).[22]

Dealing first with Block's alleged reasons for laying off Briggs (and, later, for not recalling Briggs to work), Block's various explanations tended to be either vague, internally inconsistent, or false. Asked during adverse examination to give his reasons for laying off Briggs on December 3, Block responded: "I don't know. No longer needed that machine, and part of his absenteeism from the job, and general work attitude."

As to the implicit suggestion by Block that Briggs was laid off on December 3 because of an absence of work for his particular "machine," these features deserve note: First, there is an absence of any real claim by Block that there was some particular incident which prompted the decision to lay Briggs off on December 3. That there was reduced demand for compactor operators (Briggs' "machine" at that time referred to by Block),[23] while undisputed, does not support the corollary claim implicit in Block's remarks; i.e., that there was no other work for Briggs. Indeed, the record shows that other, less-experienced operators who had been on the job less time than Briggs were retained to operate equipment which Briggs was able to operate.[24] And, recognizing that Briggs had been retained earlier, and was reassigned to work on a different job, even after his work as a loader operator on the night shift had been curtailed, it is difficult to conclude that Respondent had any strict policy of laying off, rather than reassigning, an experienced operator when the demand for his particular "machine" became reduced.[25]

Accordingly, it is doubtful that the mere lack of need for one of the compactors then in use had any real influence in causing Block to decide to lay off Briggs on December 3. Of course, an accumulation of dissatisfactions about other aspects of Briggs' performance might tilt the balance; and Block admittedly attempted to claim that this was the case in his statements that Briggs' "absenteeism" and "general work attitude" were also motivating features. I deal with those explanations below.

As to Briggs' alleged absenteeism as a factor, the record shows that Briggs was absent on 4 consecutive days in the week ending November 15,[26] on 2 separate days in the week ending November 22, and on 4 consecutive days in the week ending November 29. The latter period must be ignored (as Respondent concedes) because it was associated with a general, weather-related shutdown. It is also undisputed that all of these absences were taken with the knowledge and acquiescence of Respondent's agents. While Block sought to create the general impression that he found such absences vexing and disruptive of urgent production needs, Block admits that he never warned Briggs about his conduct in this regard. It is also noteworthy that Respondent's published policy was to issue warnings when "absenteeism" was deemed excessive; and that "*[a]fter two (2) warnings the third (3rd) offense* will result in *immediate discharge*."[27] Accordingly, here, as in the case of Carlen below, Respondent's failure to follow the very "standard . . . which it has set for itself"[28] its probative in assessing the real motivation underlying its actions against alleged discriminatees.

Block further undermined his own believability and thereby strengthened the inference of discriminatory

[21] I note that the Board and some courts of appeal are in disagreement as to the precise nature of the employer's burden after a *prima facie* case of unlawful discrimination has been made out, and that these issues are the subject of certiorari review by the Supreme Court in *NLRB v. Transportation Management, supra.* In any case, I do not find Respondent's defense to have brought the record back to a state of "equipoise" on the ultimate discrimination issue (see, e.g., the First Circuit's discussion in *NLRB v. Wright Line*, 662 F.2d at 904–905).

[22] Necessarily, the same considerations would cause me to reject Respondent's defense as inadequate to meet its *Wright Line* burden if, *arguendo*, it had "dual motives."

[23] Compactors continued to be used thereafter, but on a reduced scale.

[24] For example, Linda Thomas credibly testified that her son, David Fehmel, and his friend, Neil Abbott, had come to the job without any operating experience. They were retained after Briggs' layoff. Block attempted to dispute the suggestion by the General Counsel that there were operators who were not as experienced as Briggs (or Carlen), but Block is contradicted by admissions in campaign literature signed by Respondent's executive "Bitz" Brown referring to the fact that some of the operators were inexperienced (see G.C. Exh. 3).

[25] For reasons discussed earlier at fn. 6, I do not find credible Block's statement that he retained Briggs after the curtailment of night shift operations in order to avoid any suggestion of discrimination against Briggs due to his union activities. If that is true, it may be asked moreover why a similar sense of caution did not influence Block to retain Briggs beyond December 3; i.e., until the December 11 election had been concluded. Block's evidently false explanation here, incidentally betraying a tendency to deal in an extraordinary manner with union activists, merely serves to augment the suspicion that he wished to camouflage the real considerations which influenced his decisions affecting Briggs.

[26] Although Briggs changed his testimony on the subject, I credit his ultimate explanation that the 4 consecutive days of absence in the week ending November 15 were linked to a trip he had taken back to the Midwest to move some belongings, which Block was admittedly aware of. Crediting Linda Thomas' testimony, Block was seemingly unconcerned about that absence at the time.

[27] G.C. Exh. 2. Addressing this, Block stated in substance that he did not pay much attention to these printed policies. Block was not convincing when he said this and the suggestion that these rules had no real utility or application on the IPP is directly contradicted by Bitz Brown's October 14 campaign letter to employees in which he stated, referring to the above-quoted rules, ". . . we should review the company's policies that affect your jobs and your pay checks. Your foreman will give you a written summary of these policies. Don't hesitate to ask any questions you may have. It is worth the effort to avoid any misunderstanding." (See G.C. Exh. 3.)

[28] *FPC Advertising*, 231 NLRB 1135, 1136 (1977).

intent (*Shattuck Denn Mining, supra*) when he embellished his testimony further by saying that he followed a "three strikes and you're out" approach which, in the context of absences, meant that 3 absences within "a couple weeks' time" would cause him to terminate an employee. Yet, as is detailed in the General Counsel's brief,[29] Respondent's own records contradict this claim in a substantial number of instances, showing that many employees had absences of more than 3 days within 2 weeks without having been terminated. Indeed, Gerald Freeman missed 4 days of work in 1 week without being terminated and he was recalled in the following spring. Even more probative here was Linda Thomas' account of an incident where Block was, contrary to the tenor of his testimony at trial, suprisingly solicitous of the 5-day absence of Eugene Varah in the week ending November 1.[30] There, as Thomas testified, and I find, Block asked Thomas to get in touch with Varah to ask if he intended to return to work. Thomas did so and Varah was allowed to resume working. Varah was also recalled to work in the following spring.

Accordingly, the evidence generally does not support Block's assertion that he was moved to lay Briggs off prematurely (and later not to recall him) because of his record of absences. And the apparently bogus character of Block's assertion here causes me to doubt the sincerity of his attempt to fall back finally on a general disparagement of Briggs' "general work attitude." Pressed on this point by the General Counsel, Block was initially unable to recall examples, beyond the belief that Briggs had a tendency to "stroke it."[31] I do not regard as worthy of further discussion the minimal examples[32] which Respondent's counsel was eventually able to elicit from Block on this point, since, although essentially undisputed, they do not appear to have caused any concern to Briggs' supervisors. Moreover, it is clear from their testimony that Briggs' supervisors simply did not share Block's low assessment of Briggs' general performance. It is also significant, as Block admits, that Block made no effort to confer about Briggs with Briggs' foreman before deciding to lay him off. I am more inclined to view Block's citation of the "attitude" matter as reflecting Block's distaste for Briggs' "attitude" as it was manifested in his protected activities.[33]

I thus conclude that Block's asserted reasons were not the ones which truly motivated his decisions to lay off Briggs on December 3 and later not to recall him to work and that, in any case, even if they were present in his mind when he made those decisions, they were not "causative" in the *Wright Line* sense.

Block's professed reasons for refusing to recall Carlen when work resumed in the spring really boil down to one—that Carlen, like Briggs, was "stroking it" on the job (and, indeed, had done so on previous jobs for Respondent known to Block and other supervisors present on the IPP). There are many features to this defense which are defective for the same reasons discussed in the case of Briggs. Block admits that, contrary to published policy, he did not issue a series of warnings to Carlen about his alleged malefactions (although Block and Carlen agree that on one occasion, Block showed displeasure about Carlen's idleness). But the most incredible feature in Block's claim that Carlen's tendency to be idle prompted the decision not to recall him is the nature of the proof itself. Thus, Block and other supervisors with knowledge of Carlen's performance on previous jobs for Respondent uniformly left the impression that Carlen *has always been* a qualified, but lackadaisical, operator who was, on balance, unsatisfactory. This appears to prove too much, however, since it is evident that the same considerations which purportedly caused Block to refuse to recall Carlen in the spring were present when Block initially agreed to hire Carlen on the IPP job.[34] It is also difficult to accept Block's claim that the only reason that he hired Carlen in the first place was that he was having difficulty getting experienced operators. As noted earlier, Carlen was one of the first operators hired by Block and there is no evidence that Block had already screened and rejected inexperienced operators before agreeing to hire Carlen. Moreover, Block's protestation that the operators which he eventually hired *were* experienced (although contrary to the credited record) reveals the ease with which Block switched ground on this point. Finally, assuming that at some point Block truly believed that he had assembled a satisfactory crew of experienced operators, Block did not credibly explain why he allowed Carlen thereafter to remain on the job.[35]

These considerations cause me to believe that Block (and other foremen called to support Block's testimony) tended to exaggerate the shortcomings which they attributed to Carlen. Put another way, Carlen could not have been as undesirable as he was portrayed in the picture which Block and those foremen ultimately painted of him, for Block would not have encouraged him to come to the IPP in the first instance had he been that much of a loafer. Block's having presented unconvincing explanations for his decision to reject Carlen for recall while generally recalling experienced operators from the previ-

[29] G.C. br., pp. 25–27.

[30] I rely here on the admission that this was the case in the general absence summary received as Resp. Exh. 4, even though that exhibit is not entirely reliable when compared to certain original records incidentally received as to certain employees.

[31] In Block's lexicon, this expression is apparently synonymous with goldbricking.

[32] These include Briggs' request to leave work early one day (granted by his foreman) to take his cat to a veterinarian, and Briggs' request not to take a late-in-the-day assignment to operate a scraper for an hour, because that work would aggravate his leg, which had earlier been injured on the job. This request was also honored by Briggs' foreman.

[33] References to an employee's undesirable "attitude" is often properly seen as a coded reference by management officials to activities which are protected by the Act, but which are also perceived to be inimical to management's interests. E.g., *Crown Cork & Seal, supra*, 255 NLRB at 39, fn. 96, and cases cited.

[34] Crediting Carlen's undenied testimony here, Carlen did not even leave the Midwest to travel to Utah for work on the IPP until he had spoken to Block by telephone and the latter had told him that there would be work for him.

[35] Block attempted an explanation; i.e., that he did not wish to put any favorable election results in doubt by laying off a conspicuous union supporter before the election. But, as noted above, these purported inhibitions did not ultimately prevent Block from "jeopardizing" the election results by laying Briggs off before the election. Again, the seeming falseness of Block's explanation adds weight to the inference that unlawful considerations triggered Block's ultimate judgment not to recall Carlen.

ous season, and while even resorting to new hires during the spring phase causes me to conclude that the General Counsel's *prima facie* case suggests the more probable explanation for Block's actions.

In reaching conclusions respecting the failure to recall Carlen, I have also considered Linda Thomas' testimony that Respondent's labor relations consultant, Curren, indicated "respect" for Carlen and sought to convey an assurance that Carlen would keep his job, despite his key role as a supporter of the Union. But Curren was not shown to have any influence on Respondent's decisions affecting recall of employees and there is no evidence that he was still retained by Respondent in the spring, when Block was making recall decisions. It is clear that Curren's estimation of Carlen's chances for keeping his job turned out to be inaccurate.[36] By contrast, the expression by Tom Lambrecht, admitted to Thomas by Florey, that Lambrecht had been prepared to terminate Carlen if Respondent had lost the election, was a message which Block could be expected to heed. And, even if Tom Lambrecht was, by that same message, indicating, in the euphoria of an election victory, that he was willing to forgo a vidictive intention which he had earlier entertained, it is not difficult to suppose that those earlier retaliatory impulses would resurface when decisions were being made in the following spring respecting which operators would be recalled.

Accordingly, while these matters are not free from doubt (and discrimination cases rarely are), I am satisfied at least that the credible evidence preponderates in favor of the conclusion that unlawful, discriminatory considerations caused Block to act against Briggs and Carlen, as alleged in the complaint.

## CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. In selecting Gerald Briggs for early layoff on December 3, 1981, and in choosing not to recall either Gerald Briggs or Terry Carlen for available work following a general winter shutdown of operations on the IPP, E. W. "Bill" Block, Respondent's agent responsible for those decisions, was moved by hostility toward their activities on behalf of the Union and, by those acts and each of them, Respondent thereby has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

## THE REMEDY

Having found that Respondent violated Section 8(a)(3) and (1) of the Act as set forth above, I shall recommend that Respondent be ordered to cease and desist therefrom, and to make employees Gerald Briggs and Terry Carlen whole for the discrimination practiced against them, with interest.[37]

Inasmuch as the record reflects that Respondent's scheduled work on the IPP was of limited duration and had been completed by the time of the trial herein, I do not include in my recommended Order any express direction that Respondent reinstate employees Carlen and Briggs. Because Respondent's employees on that project may be presumed to have left the Delta, Utah, jobsite—if not the general area—by now, I shall recommend that Respondent mail copies of the proposed remedial notice to the current mailing addresses of all employees employed by it on the IPP job. The addresses to be used for this purpose shall be subject to the approval of the Regional Director of Region 27, who may, in fulfillment of his role in supervising compliance with this order, make independent investigation as to the current whereabouts of such former IPP employees, and the best means of providing them by mail with said notices.

Upon the foregoing findings and conclusions and upon the entire record, I issue this recommended:

## ORDER[38]

The Respondent, Brown and Lambrecht Earth Movers, Inc., Delta, Utah, its officers, agents, successors, and assigns, shall:

1. Cease and desist from laying off or refusing to recall employees from layoff in order to discourage membership in a labor organization, or in any other like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action consistent with the section above captioned "The Remedy" which is necessary to effectuate the purposes and policies of the Act:

(a) Make employees Gerald Briggs and Terry Carlen whole, with interest, for, respectively, having prematurely laid Briggs off on December 3, 1981, and for having refused to recall both Briggs and Carlen when work on the IPP was resumed in 1982.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Mail copies of the attached notice marked "Appendix"[39] to all persons employed by it on its IPP job at

[36] Inferentially, however, Curren's seeming assurance to Thomas that Carlen would retain his job strongly tends to contradict Block's testimony that he had been prepared to let Carlen go earlier because of his poor performance, but was only inhibited by a desire not to jeopardize the election results. Had there been such a decision, it would almost certainly have involved Curren's imput, as Respondent's labor relations and campaign consultant.

[37] All "make whole" amounts due under the recommended Order are to be computed in accordance with formulas and policies established in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977).

[38] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[39] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Delta, Utah, using their current mailing addresses as approved by the Regional Director for Region 27.

(d) Notify the Regional Director for Region 27, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.